IN THE

Supreme Court of the United States

October Term, 1943.

No. .....

NEW YORK HANDKERCHIEF MFG. CO.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit and Brief in Support of Petition.

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit and Brief in Support of Petition.

To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of Matter Involved.

A judgment dismissing petitioner's complaint was entered by the District Court of the United States for the Northern District of Illinois, Eastern Division, on January 4, 1943 (R., p. 29). Said judgment was affirmed by the United States Circuit Court of Appeals for the Seventh Circuit on April 25, 1944 (R., p. 43). Petitioner prays that a writ of certiorari issue to review said judgment.

On August 9, 1937, petitioner filed with the office of the Collector of Internal Revenue, First District of Illinois, a claim for the refund of $3,654.30 paid as floor stocks taxes under the provisions of the Agricultural Adjustment Act of 1933 (R., pp. 11-19). Since the claim was not filed prior to July 1, 1937 as required by Section 903 of the Revenue Act of 1936, it was rejected by the Commissioner of Internal Revenue on May 26, 1938 (R., p. 19). Subsequently, Congress enacted Section 405 of the Revenue Act of 1939 which extended the time for filing claims under Title VII of the Revenue Act of 1936 to December 31, 1939. Thereafter, the Commissioner, in a letter dated November 16, 1939, notified the petitioner that its claim for refund would be treated as a claim timely filed within the meaning of Section 903 of the Revenue Act of 1936 as amended, and would be re-opened for consideration on its merits (R., pp. 20-21). The Commissioner, on February 1, 1940, wrote to petitioner requesting additional evidence (R., pp. 21-22). On April 13, 1940, petitioner wrote the Commissioner, under oath, that the records requested were not available since they had been destroyed because petitioner did not have adequate space to maintain them over so long a period (R., p. 24). On May 4, 1940, petitioner was notified that its claim for refund had been rejected on the ground that the evidence submitted by it in support thereof, failed to establish, as required by Section 902 of Title VII of the Revenue Act of 1936 and Regulations 96, that the plaintiff had borne the burden of the taxes, refund of which was claimed (R., pp. 24-25).

On May 1, 1942, petitioner instituted suit in the United States District Court for the refund of the floor stocks taxes paid as aforesaid (R., pp. 2-7). The respondent moved to dismiss the complaint on the grounds, (1) that under Section 903 of the Revenue Act of 1936 (49 Stat. 1648) and Regulations 96, the court did not have jurisdiction of the action because petitioner submitted no evidence

in support of its claim for refund and (2) that the action was barred by Section 904 of the Revenue Act of 1936 under which petitioner had two years from May 26, 1938 to commence this action (R., pp. 8-9).

The District Court granted the motion to dismiss, without opinion (R., p. 29). The Circuit Court affirmed the judgment of the District Court on ground (1), not ruling on ground (2) for the reason that upon oral argument respondent's counsel stated that said point was without merit (R. p. 45).

Jurisdictional Statement.

It is contended that the Supreme Court has jurisdiction to review the judgment here in question under the Act of February 13, 1925 (C. 229; 43 Stat. 938) amending the Judicial Code, Section 240, Title 28 U. S. C. A., Section 347; and under Rule 38, subdivision (5) of the Rules of the Supreme Court.

Questions Presented.

The questions herein presented are:

1. Do Section 903 of the Revenue Act of 1936 as amended by Section 405 of the Revenue Act of 1939, and the provisions of Regulations 96 require that evidence be submitted to the Commissioner in support of a claim for refund of taxes paid under the Agricultural Adjustment Act of 1933 (48 Stat. 31)?

2. Does petitioner's claim for refund comply with Section 903 of the Revenue Act of 1936 as amended by Section 405 of the Revenue Act of 1939 and Regulations 96?

3. Does the District Court have jurisdiction of the action?

Reasons Relied on for Allowance of Writ.

1. The decision of the Circuit Court of Appeals for the Seventh Circuit in the within matter is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *Bethlehem Baking Co.* v. *U. S.*, 129 F. (2d) 490 (C. C. A. 3rd, 1941). The latter case also involved a claim for refund under Title VII of the Revenue Act of 1936 of taxes paid under the Agricultural Adjustment Act of 1933 (48 Stat. 31) and dealt with the question as to whether a claim for refund submitted to the Commissioner must be substantiated by evidence.

The instant decision is also in conflict with the following decisions of United States District Courts in the Third, Fourth, Fifth and Ninth Circuits:

Hutzler Bros. v. *U. S.*, 33 Fed. Supp. 801 (D. C. Md. 1940);

Bullock's Inc. v. *U. S.*, 43 Fed. Supp. 861 (S. D. Calif. 1941);

Ney et al. v. *U. S.*, 33 Fed. Supp. 554 (W. D. Va. 1940);

Joe Hanna v. *U. S.*, 27 AFTR 1135 (W. D. Texas 1940);

Bricker Baking Co. v. *Rothensies, et al.*, 46 Fed. Supp. 742 (E. D. Pa. 1942).

2. The decision of the Circuit Court of Appeals for the Seventh Circuit in the within matter is likewise in direct conflict with the following decisions of the Circuit Court of Appeals for the Fifth and Sixth Circuits:

Snead, Collector v. *F. H. Elmore*, 59 F. (2d) 312 (C. C. A. 5th, 1932) (26 U. S. C. A. 156; Reg. 45, Art. 1036);

Paul Jones & Co. v. *Lucas*, 33 F. (2d) 907 (D. C. Ky. 1929) Affirmed 64 F. (2d) 1016 (C. C. A. 6th, 1933) (Revenue Act of 1926, Sec. 1113 [a]; Reg. 69, Art. 1304).

These cases involved claims for refund under other but similar statutes on the question as to whether a claim for refund submitted to the Commissioner must be substantiated by evidence. The authority for analogy to the latter is found in the Congressional Committee Report on the Revenue Act of 1936 (C. B. 1939-1, Part 2, pp. 699-700).

The Circuit Court in the within matter in the course of its opinion (R., p. 45) found, as contended by plaintiff, that the regulations concerned in the last two mentioned cases, which are similar to those here involved, do not require that the evidence on which the claimant relied be presented to the Commissioner.

The instant decision is also in conflict with the following decision of the United States District Court in the Sixth Circuit involving the same issue:

Fidelity & Columbia Trust Co. v. *Lucas*, 7 F. (2d) 146 (D. C. Ky. 1925).

3. The Circuit Court of Appeals for the Seventh Circuit has decided an important and substantial question of federal law which has not been and should be settled by the Supreme Court.

Respondent had moved to dismiss the complaint on the ground, in part, "that this court is without jurisdiction of the matters and things of which the plaintiff complains, and is without jurisdiction to render judgment in favor of plaintiff and against defendant * * *" (R., p. 8) for the reason that no evidence had been submitted to the Commissioner of Internal Revenue. The Circuit Court, without ruling specifically on the question of jurisdiction,

has ruled, in effect, by its affirmance of the dismissal of the complaint that the District Court had no jurisdiction of the action. This question of jurisdiction of the District Court, it is submitted, is of utmost importance and should be settled by the Supreme Court.

Further, there are many hundreds of cases such as the instant one still pending in the Federal District Courts. Recovery will be denied claimant in some circuits for the same reason that recovery was here denied, whereas, other claimants in similar factual situations, but in different circuits, will recover. If certiorari is here granted and the ultimate guiding rule in this type of case is announced by the Supreme Court, there will be uniformity of decision in the several circuits; thus, there will be no advantage afforded to some claimants solely by reason of their geographical location; further, many claimants will then be in a position to determine whether to proceed with or discontinue their actions, with a resultant saving of time and expense for the courts, counsel and litigants.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket No. 8335, *New York Handkerchief Mfg. Co., Appellant* v. *The United States of America, Appellee*, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by this court, and for such further relief as this court may seem proper.

Dated, July 6, 1944.

DAVID SILBERT,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinions of Courts Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R., pp. 43-45) was rendered on April 25, 1944; 44 U. S. Tax Cases 9295. No opinion was rendered by the District Court for the Northern District of Illinois, Eastern Division. Judgment was rendered by said District Court (R., p. 29), on January 4, 1943.

Jurisdiction.

1. The date of the judgment to be reviewed is April 25, 1944; the petition for writ of certiorari is being presented before July 25, 1944.

2. The statutory provision which is believed to sustain the jurisdiction of this court is the Act of February 13, 1925 (C. 229; 43 Stat. 938) amending the Judicial Code, Section 240; Title 28 U. S. C. A. Section 347, and Rule 38, subdivision (5) of the Rules of the Supreme Court.

3. The nature of the within case and the rulings of the Circuit Court are such as to bring the case within said jurisdictional provisions.

The case involves an important question of federal law which has not been and should be settled by the Supreme Court. The action was brought for the refund of floor stocks taxes paid under the provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31) (R., pp. 2-7). A claim for refund of said taxes, which had

been filed with the Commissioner of Internal Revenue under Title VII of the Revenue Act of 1936 (49 Stat. 1648) and Regulations 96 (R., pp. 11-19) was rejected by him (R., pp. 19, 24-25). The Circuit Court affirmed the judgment of the District Court dismissing plaintiff's complaint and ruled that there was no error in said dismissal, since plaintiff has failed to present evidence to the Commissioner in support of its claim for refund; and that under the statute and regulations, a claim submitted to the Commissioner must be substantiated by evidence (R., p. 45).

Said ruling of the Circuit Court is in direct conflict with a decision of the Circuit Court of Appeals for the Third Circuit and with decisions of Federal Courts in the Third, Fourth, Fifth, Sixth and Ninth Circuits. Said decisions are listed in paragraph "4", *infra*.

4. The cases believed to sustain said jurisdiction are as follows:

Bethlehem Baking Co. v. *U. S.*, 129 F. (2d) 490 (C. C. A., 3d, 1941);

Hutzler Bros. v. *U. S.*, 33 Fed. Supp. 801 (D. C., Md., 1940);

Bullock's Inc. v. *U. S.*, 43 Fed. Supp. 861 (S. D., Calif., 1941);

Ney, et al. v. *U. S.*, 33 Fed. Supp. 554 (W. D., Va., 1940);

Joe Hanna v. *U. S.*, 27 AFTR, 1135 (W. D., Texas, 1940);

Bricker Baking Co. v. *Rothensies, et al.*, 46 Fed. Supp. 745 (E. D., Pa., 1942);

Snead, Collector v. *F. H. Elmore*, 59 F. (2d) 312 (C. C. A., 5th, 1932) (26 U. S. C. A., 156; Reg. 45, Art. 1036);

Paul Jones & Co. v. *Lucas*, 33 F. (2d) 907 (D. C., Ky., 1929), Affirmed 64 F. (2d) 1016 (C. C. A., 6th, 1933) (Revenue Act of 1926, Sec. 1113 [a]; Reg. 69, Art. 1304);

Fidelity & Columbia Trust Co. v. *Lucas*, 7 F. (2d) 146 (D. C., Ky., 1925).

5. The questions here involved are substantial for the reason that many hundreds of cases for the refund of taxes paid under the Agricultral Adjustment Act of 1933, involving millions of dollars, are now pending in the Federal Courts; the question as to the construction of the Revenue Act of 1936 and Regulations 96 concerning the necessity for submission of evidence to the Commissioner is involved in a great many of said cases.

The question as to the jurisdiction of the District Court over the action is also important and substantial.

Statement of Case.

This has already been stated in the preceding petition in "Summary Statement of Matter Involved" (pp. 1-3), which is hereby adopted and made a part of this brief.

Specification of Errors.

The Circuit Court erred in holding that:

1. Section 903 of the Revenue Act of 1936 as amended by Section 405 of the Revenue Act of 1939, and Regulations 96 require that evidence be submitted to the Commissioner in support of a claim for refund.

2. Plaintiff's claim for refund did not comply with said statute and regulations.

3. The District Court did not have jurisdiction of the action.

ARGUMENT.

Summary of Argument.

Certiorari should be granted for the reasons that:

POINT I.

THE CIRCUIT COURT'S DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF THE THIRD CIRCUIT AND DISTRICT COURTS IN OTHER CIRCUITS, ON THE QUESTION AS TO WHETHER SECTION 903 OF THE REVENUE ACT OF 1936 AS AMENDED, AND REGULATIONS 96 REQUIRE THE SUBMISSION OF EVIDENCE TO THE COMMISSIONER OF INTERNAL REVENUE IN SUPPORT OF A CLAIM FOR REFUND OF TAXES PAID UNDER THE AGRICULTURAL ADJUSTMENT ACT OF 1933.

POINT II.

THE CIRCUIT COURT'S DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF THE FIFTH AND SIXTH CIRCUITS, INVOLVING SIMILAR STATUTES AND REGULATIONS, ON THE QUESTION AS TO WHETHER THE SUBMISSION OF EVIDENCE TO THE COMMISSIONER OF INTERNAL REVENUE IS REQUIRED IN SUPPORT OF A CLAIM FOR REFUND.

POINT III.

AN IMPORTANT AND SUBSTANTIAL QUESTION OF FEDERAL LAW IS INVOLVED WHICH HAS NOT BEEN AND SHOULD BE SETTLED BY THE SUPREME COURT.

POINT I.

The Circuit Court's decision is in direct conflict with decisions of the Third Circuit and District Courts in other Circuits on the question as to whether Section 903 of the Revenue Act of 1936 as amended and Regulations 96 require the submission of evidence to the Commissioner of Internal Revenue in support of a claim for refund of taxes paid under the Agricultural Adjustment Act of 1933.

In *Bethlehem Baking Co.* v. *U. S.*, 129 F. (2d) 490 (C. C. A. 3rd, 1941), the Circuit Court thus stated the question in the case:

> "The principal question in this case is whether the matter submitted by the plaintiff taxpayer to the Commissioner of Internal Revenue in support of a claim for refund of taxes paid under the Agricultural Adjustment Act of 1933 complied sufficiently with the requirements of Title VII, Section 902, of the Revenue Act of 1936, c. 690, 49 Stat. 1648 (providing for refund of such taxes), so as to preserve the plaintiff's standing to sue for the refund following the Commissioner's disallowance of the claim * * *"

The court in the cited case ruled that all evidence relied upon by the taxpayer did not have to be submitted to the Commissioner. It held:

> "In Section 903 of the Revenue Act of 1936 there is the additional provision that 'All evidence relied upon in support of such claim shall be clearly set forth under oath' * * * *Was the requirement in Section 903 intended to impart finality to the decisions of the Commissioner* with respect to claims

for refund by * * * *withdrawing jurisdiction from the courts in such regard because the Commissioner was not satisfied that all evidence relied upon in support of the claim had been clearly set forth under oath?* We think not. Section 903 appears to be in furtherance of the administration of Section 902. It indicates no legislative intent to give greater finality to the decisions of the administrative officer than did Section 902 * * * " (Italics ours.)

The Court in the latter case cited *Hutzler Bros.* v. *U. S.*, 33 Fed. Supp. 801 (D. C. Md. 1940). In the said case, the Government's contention was similar to that made in the instant case. It is thus stated by the Court:

"It is contended that by this provision the plaintiff was required to set forth under oath all of the evidence upon which it relied as a condition precedent to the allowance of any claim for refund, and that no suit may be maintained in this Court by plaintiff unless it alleges,—as it did not do,—as an essential part of its right of action, that it had presented to the Commissioner all the available evidence bearing upon its right to refund * * * "

The Court held as to said contention:

" * * * We find this position of the Government to be without merit. Where a claim has been rejected by the Commissioner and such a fact is alleged in the complaint, no further allegation is necessary for the maintenance of a suit for refund; and in such suit a plaintiff is not limited to the same evidence produced before the Commissioner. *The intent of the statute, reasonably interpreted from*

the language employed and above quoted, is to bar consideration of claims merely on informal statements or memoranda, and to surround the presentation of claims with full verification, but it is not intended that a claimant who produces before the Commissioner certain evidence is forever thereafter barred from introducing further evidence in resorting to a Court proceeding for refund,—a right which is expressly given by Section 905 of the Act." (Italics ours.)

To the same effect as the two cited cases, see:

Bullock's Inc. v. *U. S.*, 43 Fed. Supp. 861 (S. D. Calif. 1941);
Ney, et al. v. *U. S.*, 33 Fed. Supp. 554 (W. D. Va. 1940);
Joe Hanna v. *U. S.*, 27 AFTR 1135 (W. D. Texas 1940);
Bricker Baking Co. v. *Rothensies et al.*, 46 Fed. Supp. 742 (E. D. Pa. 1942).

The Circuit Court in the instant case held that "a claim submitted to the Commissioner under the statute and regulations must be substantiated by evidence" (R., p. 45). Said decision, it is submitted, is in direct conflict with the decisions above set forth.

POINT II.

The Circuit Court's decision is in direct conflict with decisions of the Fifth and Sixth Circuits involving similar statutes and regulations on the question as to whether the submission of evidence to the Commissioner of Internal Revenue is required in support of a claim for refund.

Petitioner's authority for reference to other statutes and regulations concerning other claims for refund is found in the Congressional Committee Report on the Revenue Act of 1936 (C. B. 1939-1, Part 2). The purpose of said statute is thus stated (pp. 699, 700):

> "The revision of the provisions of section 21 (d) contained in Title VII adheres to the fundamental principle of equity applicable in respect to claims for refund, namely, that the claimant secure a refund only with respect to the amount of tax of which he bore the economic burden. However, the procedure in the handling of these claims has been modified so as to diminish in so far as possible the administrative burden involved in passing on them. The greater number of claims which may be filed relate to claims for compensating taxes and floor stock taxes. In these cases the issue of fact as to whether or not the claimant bore the economic burden of the tax will be relatively simple. *The bill therefore proposes that such claims shall be handled in the same manner as any other claims for refund under existing law.* The claimant will merely present his claim to the Bureau of Internal Revenue, and it will be passed on without formal hearing. If the claimant is dissatisfied with the decision of the Commissioner, he

> will then have recourse to the district court or the Court of Claims." (Italics ours.)

The manner in which "any other claims for refund under existing law" was handled is illustrated in the following cases; petitioner's interpretation of Section 903 of the Revenue Act of 1936, here involved, is supported by these cases which place a similar interpretation on similar statutes concerning "other claims for refund".

In *Paul Jones & Co.* v. *Lucas*, 33 F. (2d) 907 (D. C. Ky. 1929), affirmed 64 F. (2d) 1016, the Revenue Act of 1926 (Sec. 1113[a]) and Regulations 69 (Art. 1304) were involved. The court held:

> "The provision contained in Article 1304 of Treasury Regulations 69, *supra*, to the effect that 'all facts relied upon in support of the claim should be clearly set forth in detail under oath' is a proper exercise of the power delegated to the Commissioner of Internal Revenue to make rules and regulations for the enforcement of the act in question * * *."
>
> "Fairly construed, the language of the regulations just quoted *does not require all the evidence upon which a taxpayer relies to be presented to the Commissioner.* It simply requires the fact or reasons for the alleged illegality of the tax to be presented to the Commissioner, leaving the taxpayer entirely free, if he fails to secure relief at the hands of the Commissioner, to adduce, in a suit in court, new and additional evidence in support of the fact or reasons relied upon to establish the illegality of the tax." (Italics ours.)

In *Snead, Collector* v. *F. H. Elmore*, 59 F. (2d) 312 (C. C. A. 5th, 1932), the statute and regulations involved

were 26 U. S. C. A. 156 and Reg. 45, Art. 1036. The court stated:

> "The regulations then in force, No. 45, Art. 1036, require that 'all the facts relied upon in support of the claim shall be clearly set forth under oath'. * * * *This does not mean that the claim for refund must have contained all the evidence or argument* that is offered in the suit, but it must have indicated not only the amount claimed but the substantial grounds on which illegality is asserted and the general facts supporting the grounds * * *."

In *Fidelity & Columbia Trust Co.* v. *Lucas*, 7 F. (2d) 146 (D. C. Ky. 1925), the court stated as follows:

> " * * * in suits to recover internal revenue taxes erroneously or illegally assessed and collected, * * * Congress has not committed the final decision in these matters to the Commissioner of Internal Revenue, or to any other executive or ministerial officer. On the contrary, *jurisdiction to finally determine such matter is conferred upon the Judicial Dept.*, provided the taxpayer has first taken all the steps required by law to be taken before appealing to the court. * * *
>
> "In view of these statutory provisions (Section 3226 of the Revised Statutes, among others) and the authorities referred to, *this court is satisfied that it has jurisdiction to try the question of the plaintiff's tax liability in this case de novo, without in any way being limited to the evidence heard by the Commissioner, and unprejudiced by any action he may have taken in the matter.* * * * " (Italics ours.)

Section 903 of the Revenue Act of 1936 and Article 202 of Regulations 96 (see Appendix) involved in the instant case are similar in their requirements to the statute and regulations involved in *Paul Jones & Co.* v. *Lucas*, and *Snead, Collector* v. *F. H. Elmore*, *supra*. The Circuit Court herein found (R., p. 45) as contended for by petitioner, that the regulations involved in the two cited cases "do not require that the evidence on which the claimants relied be presented to the Commissioner".

It is submitted that the said finding is inconsistent with the Court's decision herein that under Section 903 and Regulations 96 evidence must be submitted to the Commissioner, in view of the similarity in statutory requirements; that said decision defeats the purpose of said statute as stated in the Congressional Committee Report, *supra*, that claims for refund "shall be handled in the same manner as any other claims for refund under existing law"; and that said decision is in direct conflict with the decisions in the two cited cases.

POINT III.

An important and substantial question of federal law is involved which has not been and should be settled by the Supreme Court.

Respondent had moved to dismiss the complaint on the ground, in part, "that this court is without jurisdiction of the matters and things of which the plaintiff complains, and is without jurisdiction to render judgment in favor of plaintiff and against defendant * * *" (R., p. 8) for the reason that no evidence had been submitted to the Commissioner of Internal Revenue. The Circuit Court, without ruling specifically on the question of jurisdiction, has ruled, in effect, by its affirmance of the dismissal of

the complaint, that the District Court has no jurisdiction of the action.

Whether the submission of evidence to the Commissioner of Internal Revenue is a condition precedent to the District Court's jurisdiction of the action, so that failure to submit such evidence would oust the Court of jurisdiction, is a substantial question of federal law and of the utmost importance and should be settled by the Supreme Court. Further, there are many hundreds of cases such as the instant one still pending in the Federal Courts. Recovery will be denied claimants in some circuits for the same reason that recovery was here denied, whereas, other claimants in similar factual situations, but in different circuits, will recover. If certiorari is here granted and the ultimate guiding rule in this type of case is announced by the Supreme Court, there will be uniformity of decision in the several circuits; thus, there will be no advantage afforded to some claimants solely by reason of their geographical location; further, many claimants will then be in a position to determine whether to proceed with or discontinue their actions, with a resultant saving of time and expense for the courts, counsel and litigants.

It is therefore respectfully submitted that this case is one calling for an exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

DAVID SILBERT,
Counsel for Petitioner.

KENNETH CARROAD,
B. R. DREYER,
Of Counsel.

APPENDIX.

Section 902 of the Revenue Act of 1936, as Amended.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the Trial Court, or the Board of Review in cases provided for under Section 906, as the case may be——

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control or having control over him or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor

shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

Section 903 of the Revenue Act of 1936, as Amended.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to January 1, 1940,[1] a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act; and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.

Articles 201 and 202 of Regulations 96.

Article 201. Claims—Form and where to file.—Claims for the refund of tax shall be made on the prescribed forms. Such claims shall be prepared in accordance with the instructions contained on the forms and in accordance with the provisions of these regulations. * * *

1. "January 1, 1940" substituted for "July 1, 1937" by Revenue Act of 1939.

Article 202. Facts and evidence in support of claim.—Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.

The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

(21)

Office - Supreme Court, U. S.
FILED
AUG 4 1944
CHARLES ELMORE CROPLEY
CLERK

No. 247

In the Supreme Court of the United States

OCTOBER TERM, 1943

NEW YORK HANDKERCHIEF MFG. CO., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 247

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 43–45) is reported at 142 F. 2d 111. The District Court did not render an opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 25, 1944 (R. 46). The petition for a writ of certiorari was filed July 12, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the District Court had jurisdiction of petitioner's suit for refund of amounts paid as floor stocks taxes under the Agricultural Adjustment Act even though Section 903 of the Revenue Act of 1936 prohibits the allowance of a refund in the absence of the filing with the Commissioner of Internal Revenue of a claim for refund in accordance with Regulations promulgated by the Commissioner, with the approval of the Secretary of the Treasury, and petitioner, contrary to the requirements of the applicable Regulations, submitted no factual evidence to the Commissioner in support of its assertion that the burden of the taxes paid by it had not been shifted to others.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Regulations are set forth in the Appendix, *infra*, pp. 10–14.

STATEMENT

On August 9, 1937, petitioner filed a claim with the Commisioner of Internal Revenue for refund, under Title VII of the Revenue Act of 1936, of $3,654.30 paid as floor stocks taxes under the provisions of the Agricultural Adjustment Act (R. 11–17). Under Schedule D of the claim form, where the claimant was directed to list evidence submitted with the claim, petitioner stated that it bore the full burden of the taxes for which refund was sought, but listed no evidence in sup-

port of the claim (R. 15). The Commissioner at first rejected the claim as having been filed too late (R. 19–20). Congress subsequently extended the time for filing such claims (Section 405, Revenue Act of 1939, c. 247, 53 Stat. 862 (7 U. S. C. 1940 ed., Sec. 645)) and the Commissioner then notified petitioner that its claim was thereby reopened for consideration on its merits (R. 20). In his notification letter, the Commissioner also advised petitioner that (R. 20):

> In claims of this character, section 902 of the Revenue Act of 1936 prohibits the allowance of a refund unless the claimant establishes that he bore the burden of the tax for which refund is claimed and did not shift it, directly or indirectly, to other persons or in any manner whatsoever. Accordingly, before favorable consideration may be given to your claim, you must submit evidence which will clearly establish that you bore the burden of the tax and did not shift it to others. Submission of such evidence at an early date will expedite final consideration of your claim.

On February 1, 1940, the Commissioner again wrote to petitioner advising it that sufficient evidence had not been submitted as required by Section 902 of the Revenue Act of 1936 and suggesting in considerable detail several kinds of evidence which it might furnish in support of its claim (R. 21–22). The letter concluded with the following statement (R. 22):

> The evidence establishing that you bore the burden of the tax should be submitted to this office not later than March 4, 1940.

The requested evidence was not received by March 4, 1940, and the Commissioner again wrote to petitioner, giving it thirty more days to furnish the evidence (R. 22). This extension of time was superseded by another to May 6, 1940, at petitioner's request (R. 23). Finally, a letter written under oath on April 13, 1940, was received by the Commissioner from petitioner advising that the requested records were not available since they had been destroyed due to the lack of adequate space to maintain them for so long a period (R. 24). On May 4, 1940, the Commissioner notified petitioner that its claim for refund was rejected since it had failed to establish that it bore the burden of the tax (R. 24–25).

Petitioner filed a complaint in the United States District Court for the Northern District of Illinois on May 1, 1942, seeking judgment for the $3,654.30 paid as floor stocks taxes for which claim had been made to the Commissioner and rejected (R. 2–4). On July 30, 1942, the Government filed a motion to dismiss the complaint on the ground that the court had no jurisdiction to grant the relief requested (R. 8–9). The motion was based upon Section 903 of the Revenue Act of 1936, which prohibits the allowance of a refund for floor stocks taxes paid or collected

in the absence of the filing with the Commissioner of a timely claim for refund in accordance with Regulations prescribed by the Commissioner and approved by the Secretary. It was alleged in the motion that petitioner had failed to comply with the requirements of Section 903 and the applicable Regulations in that it had furnished no evidence to the Commissioner in support of its claim from which the Commissioner could have determined that it bore the burden of the tax and had not shifted it directly or indirectly to others. The District Court granted the motion and dismissed the suit on January 4, 1943 (R. 29). The judgment of the District Court was affirmed on appeal (R. 46).

ARGUMENT

Petitioner contends that the submission of evidence to the Commissioner in support of its claim for refund of floor stocks taxes paid under the Agricultural Adjustment Act is not a prerequisite under Section 903 of the Revenue Act of 1936 (Appendix, *infra,* p. 11) to the maintenance by it of an action in the District Court for the refund (Pet. 4–5, 9–17). The contention clearly has no merit.

Section 902 of the Act (Appendix, *infra,* pp. 10–11) requires the claimant of a refund of floor stocks taxes to establish that it bore the burden of the taxes and did not shift that burden either directly or indirectly to another. The validity of this

requirement has been sustained by this Court. *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337. The District Courts are given jurisdiction of such claims for refund (Section 905, Appendix, *infra,* p. 12), but Section 903 prohibits the allowance of a refund unless—

> a claim for refund has been filed * * * in accordance with regulations prescribed by the Commissioner with the approval of the Secretary [of the Treasury].

The requirement that such a claim be filed with the Commissioner before litigation may be instituted "is a familiar provision of the revenue laws." *United States* v. *Felt & Tarrant Co.,* 283 U. S. 269, 272. Its practical purpose is the disposition of most of such claims by departmental action and without litigation. *Morristown Knitting Mills* v. *United States,* 42 F. Supp. 817, 824 (C. Cls.).

Section 903 of the Act requires that "All evidence relied upon in support of such claim shall be clearly set forth under oath", and the Regulations promulgated by the Commissioner, with the approval of the Secretary, require a claimant for refund of amounts paid as floor stocks taxes to prepare the claim in accordance with the instructions contained on P. T. Form 76 and with the Regulations and to substantiate each element of the claim by clear and convincing evidence. Treasury Regulations 96, Articles 201, 202 and 301 (Appendix, *infra,* pp. 12–13). The latter re-

quirement is reiterated in the instructions which are a part of P. T. Form 76 (R. 17), and the form itself directs the listing of evidence under Schedule D (R. 15).

Thus, Section 903 and the Regulations which implement it require evidence to be submitted to the Commissioner with a claim for refund of floor stocks taxes. This being true, Section 903 prohibits the allowance of a refund in the absence of the submission of any evidence to the Commissioner in support of such a claim, and the District Court properly dismissed the complaint petitioner filed in that court.

Contrary to petitioner's contention, the pertinent decisions uniformly support this conclusion. See *Weiss* v. *United States,* 135 F. 2d 889 (C. C. A. 7th); *Lee Wilson & Co.* v. *Commissioner,* 123 F. 2d 232 (C. C. A. 8th); *Lee Wilson & Co.* v. *Commissioner,* 111 F. 2d 313 (C. C. A. 8th); *Landrum* v. *Commisisoner,* 122 F. 2d 857 (C. C. A. 8th); *Tennessee Consolidated C. Co.* v. *Commissioner,* 117 F. 2d 452 (C. C. A. 6th); *Jaubert Bros.* v. *United States,* 50 F. Supp. 366 (E. D. La.); *Brandwein & Co.* v. *United States,* 44 F. Supp. 16 (N. D. Ill.); *Morristown Knitting Mills* v. *United States, supra.* None of the decisions cited by petitioner as being in conflict with the decision below (Pet. 4–5, 8–9, 11–17) holds that a claimant for a refund of floor stocks taxes is not required to submit any evidence to the Commis-

sioner in support of its claim. In each of the five cases cited by petitioner which involve Title VII of the Revenue Act of 1936,[1] there was evidence submitted to the Commissioner and the holding in each case was simply that, under such circumstances, finality does not attach to the Commissioner's determination and that in an action in the District Court for recovery of floor stocks taxes the taxpayer is not limited to the evidence submitted to the Commissioner.[2] Of the four other decisions cited by petitioner, three[3] contain

[1] *Bethlehem Baking Co.* v. *United States*, 129 F. 2d 490 (C. C. A. 3d); *Bricker Baking Co.* v. *Rothensies*, 46 F. Supp. 742 (E. D. Pa.); *Bullock's, Inc.*, v. *United States*, 43 F. Supp. 861 (S. D. Cal.), appeal dismissed on stipulation of counsel, 127 F. 2d 864 (C. C. A. 9th); *Ney* v. *United States*, 33 F. Supp. 554 (W. D. Va.); *Hutzler Bros. Co.* v. *United States*, 33 F. Supp. 801 (D. Md.).

[2] We do not understand petitioner to contend that it submitted any evidence whatever to the Commissioner in support of its claim for refund. It is clear, in any event, that the statements set forth in Schedule D of the claim (R. 15) were at best statements of ultimate facts and were not affirmative evidence that petitioner bore the burden of the tax, was not relieved thereof, was not reimbursed therefor, and did not shift the burden directly or indirectly. See *Weiss* v. *United States*, *supra*; *Lee Wilson & Co.* v. *Commissioner*, 111 F. 2d 313 (C. C. A. 8th) and 123 F. 2d 232 (C. C. A. 8th); *Landrum* v. *Commissioner*, *supra*; *Tennessee Consolidated C. Co.* v. *Commissioner*, *supra*; *Brandwein & Co.* v. *United States*, *supra*; *Morristown Knitting Mills* v. *United States*, *supra*.

[3] *Paul Jones & Co.* v. *Lucas*, 33 F. 2d 907 (W. D. Ky.), affirmed *per curiam*, 64 F. 2d 1016 (C. C. A. 6th); *Fidelity & Columbia Trust Co.* v. *Lucas*, 7 F. 2d 146 (W. D. Ky.); *Snead* v. *Elmore*, 59 F. 2d 312 (C. C. A. 5th).

similar holdings in respect of other statutes, and the fourth[4] is merely a judgment awarding a refund of floor stocks taxes.

CONCLUSION

The decision below is correct and involves no conflict of decisions or important, unsettled question of law. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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AUGUST 1944.

[4] *Hanna* v. *United States* (W. D. Tex.), entered June 29, 1940 (27 A. F. T. R. 1135).

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such

amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (7 U. S. C. 1940 ed., Sec. 644.)

SEC. 903. [As amended by Section 405 of the Revenue Act of 1939, c. 247, 53 Stat. 862]. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to January 1, 1940, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes. (7 U. S. C. 1940 ed., Sec. 645.)

SEC. 905. JURISDICTION OF COURTS.

Concurrent with the Court of Claims, the District Courts of the United States (except as provided in section 906 of this title) shall have jurisdiction of cases to which this title applies, regardless of the amount in controversy, if such district courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy. The United States Customs Court shall not have jurisdiction of any such cases. (7 U. S. C. 1940 ed., Sec. 647.)

SEC. 910. LIABILITY OF COLLECTORS.

No collector of internal revenue or customs, or internal revenue or customs officer or employee, shall be in any way liable to any person for any act done by him in the assessment or collection of any amount as tax under the Agricultural Adjustment Act, or for the recovery of any money exacted by or paid to him and paid into the Treasury, in performance of his official duties under the provisions of such Act, or if such collector or officer acted under the direction of the Secretary or other proper officer of the Government. (7 U. S. C. 1940 ed., Sec. 652.)

Treasury Regulations 96, promulgated under the Revenue Act of 1936:

ART. 201. *Claims—Form and where to file.*—Claims for the refund of tax shall be made on the prescribed forms. Such claims shall be prepared in accordance with the instructions contained on the forms and in accordance with the provisions of these regulations. * * *

ART. 202. *Facts and evidence in support of claim.*—Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.

The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

ART. 204. *Conditions as to tax burden with respect to amount of refund allowable.*—A refund may be allowed to the person who paid the tax, only of that amount paid as tax as to which the claimant establishes to the satisfaction of the Commissioner (1) that he bore the burden of such amount and has not been, or may not be, relieved thereof nor reimbursed therefor, and has not shifted such burden, directly or indirectly, through or by any of the means set forth in subsection (a) of section 902 of the Act; or (2) that he has repaid such amount unconditionally to his vendee who bore the burden thereof, as provided in subsection (b) of section 902 of the Act.

ART. 301. *Claim form prescribed.*—Claims for refund of amounts paid as floor stocks tax shall be filed on P. T. Form 76. (See Chapter II for general provisions relating to all claims.)

ART. 304. *Refund allowable.*—The total amount of refund allowable, and hence the total amount of refund to be claimed, is that part of the total amount of all floor stocks taxes paid by the claimant as to which such claimant bore the burden and as to which no refund or credit has been allowed to any person. (See sections 902 and 911 of the Act.)

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